IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NOS. 16 AND 17 OF 2005

CRIMINAL REVISION APPLICATION NO. 16 OF 2005

Shri Zulfikar Ali,
presently lodged in
Aguada Central Jail,
Bardez-Goa. ... Applicant

versus

State of Goa
through learned
Public Prosecutor. ... Respondent

CRIMINAL REVISION APPLICATION NO. 17 OF 2005

Shri Mehmood Shaikh
presently lodged in
Aguada Central jail,
Bardez-Goa. ... Applicant

versus

State of Goa
through learned
Public Prosecutor. ... Respondent

Mr. P. P. Singh, Advocate for the Applicants.

Mr. S. N. Sardessai, Public Prosecutor for the State/Respondents.

CORAM : N. A. BRITTO, J.

DATE : 28TH JUNE, 2006.

J U D G M E N T

These revision petitions are filed by accused no.2/Zulfikar Ali and accused no.4/Mehmood Shaik in Sessions Case No.9/2003 against their conviction and sentence under Sections 397, 342 r/w 149 of the Indian Penal Code by the learned Ad-hoc Assistant Sessions Judge, Margao, which conviction and sentence has been upheld by the learned Sessions Judge, Margao.

2. Dacoity took place on 20-9-2002 between 7.00 hours to 7.45 hours at the house of Taajdin Noorani at Aliawaas, near Cine Vishant road, Malbhat, Margao regarding which the complaint was lodged by him at about 10.00 hours at Margao Police Station on the same day. Subsequently the first four accused in the said Sessions Case came to be arrested and the

property subject matter of dacoity came to be seized from them on 25-9-2002 by Police Inspector Shri Bahadur Singh Chawan of Seheora Police Station in the State of Uttar Pradesh. The arrest of the said accused and the seizure of the property involved in the dacoity was made by Police Inspector, PW15/Bahadur Singh Chawan after he had received information that certain criminals were travelling in a maruti van bearing No.UP-21-F 5301 and after the said maruti van was chased and stopped and that too after one of the inmates of the said maruti van had opened fire at the police party of Police Inspector PW15/Bahadur Singh Chawan. As a result of the arrest of the said four accused and the seizure of the property from two bags, Police Inspector PW15/Bahadur Singh Chawan informed the Margao Town Police Station, after securing its telephone number from a Member of Parliament, as a result PW17/PSI Kadam of Margao Town Police Station proceeded to Bijnoor, U.P. and secured the custody of the accused and the property seized; and after some of the accused were identified at the Test Identification Parade held by PW8/Shri S. B. Faria, the charge sheet was filed in which accused no.5 to 8 were shown as absconding. Accused No.1 to 4 and accused no.9 to 11 came to be charged and tried under

Sections 397, 342 r/w 149 of the Indian Penal Code and Section 25 of the Arms Act, 1958. Accused No.9 to 11 were further charged under Section 216-A of the Indian Penal Code. All the accused pleaded not guilty and after the prosecution examined 18 witnesses in support of the charge, accused no.1 to 4 came to be convicted under Sections 397, 342 r/w 149 of the Indian Penal Code and acquitted under Section 25 of the Arms Act, 1958. Accused No.9 to 11 were acquitted. The accused who were convicted were sentenced under Section 397 of the Indian Penal Code to undergo rigorous imprisonment for 7 years and to pay fine of Rs.1000/- in default to undergo simple imprisonment for one month and under Section 342 of the Indian Penal Code they were sentenced to undergo simple imprisonment for two months, the sentences having been ordered to run concurrently.

3. The accused no.1 to 4 filed appeals before the Court of Sessions, Margao. The learned Sessions Judge was pleased to give benefit of doubt to accused no.1/Ishrar Ahmed @ Babu and acquit him under Sections 397, 342 r/w 149 of the Indian Penal Code and at the same time was pleased to dismiss the appeals filed by accused no.2/Zulfikar Ali, accused no.3/Sartaaj Alam

and accused no.4/Mehmood Shaikh out of these accused no.3/Sartaaj Alam has chosen not to file any revision.

4. The case of the prosecution was essentially based on the identification of accused no.2/Zulfikar Ali and accused no.3/Sartaaj Alam by PW1/Shri Noorani and accused no.3/Sartaaj Alam and accused no.4/Mehmood Shaikh by PW2/Shirin Noorani, the wife of PW1/Shri Noorani and the evidence of seizure of the stolen property from the possession of accused no.1 to 4 by Police Inspector PW15/Bahadur Singh Chawan.

5. Initially, the accused herein had filed appeals before this Court against the order of the learned Sessions Judge, in appeal against the order of the learned Assistant Sessions Judge, but by order dated 24-8-2005, the appeals were treated as revision petitions, as appeals were not maintainable.

6. These being revision petitions the scope for interference is limited. In other words, it is not permissible for this Court sitting in revision to reassess the evidence led by the

prosecution or go in depth examination of the same. This Court would be justified to interfere only in the event the conclusion of facts recorded by both the Courts below are based on any serious legal infirmity or there is failure of justice. In my view there is none. There is no serious legal infirmity at all in the appreciation of the evidence of both the Courts below, particularly in respect of the evidence of Police Inspector PW15/Bahadur Singh Chawan who has narrated in detail the circumstances under which he came to receive the information from one of his informants, and then chased the van in which the first 4 accused(in the Sessions Case) were travelling and then arrested them and seized the property of which they were found in possession and which was subsequently identified by PW1/Shri Noorani and PW2/Shirin Noorani. It has been submitted on behalf of the accused that the said two bags containing the stolen property were found in possession of five persons, the fifth person being the driver of the said maruti van in which the first 4 accused were travelling. It has been stated by Police Inspector PW15/Bahadur Singh Chawan that the first 4 accused had admitted before him that the said two bags belonged to them and that he had found out that the driver was

hired by them on charges of Rs.600/- to go from Muradabad to Shivara. In such a situation the driver of the said maruti van could not have been expected to be made an accused more so when the first 4 accused which includes the petitioners herein had admitted before Police Inspector PW15/Bahadur Singh Chawan that the said two bags which were found in the said maruti van belonged to them. The gold ornaments found in the bags were subsequently identified by PW1/Shri Noorani and PW2/Shirin Noorani, as belonging to them. The said driver was not examined in the trial as he was by then unavailable. The petitioners gave no explanation as to how they came in possession of the said gold ornaments in the said two bags and therefore, in my view, the learned Trial Court was fully justified in coming to the conclusion that the accused were the persons who had committed the said dacoity. Indeed the learned Trial Court observed that this circumstance on which the prosecution relied, is consistent with the sole hypothesis of the guilt of accused no.1 to 4 and the same was inconsistent with the guilt of their innocence. The learned Trial Court further observed that the proximity of time of alleged incident of dacoity, arrest of the first 4 accused at Bijnoor, Uttar Pradesh on 25-10-2002

with the loot of dacoity which was identified by PW1/Shri Noorani, PW2/Shirin Noorani, PW3/Smt.Noorani and PW4/Shirin M. Noorani and gold articles/jewellery with specific marks and designs as belonging to them was sufficient to draw a presumption that the accused had committed the offences alleged against them. Both the Courts have accepted the version of arrest and seizure given by PW15/P.I. Chauhan. I have no reasons not to accept the same. The accused gave no explanation, much less of a satisfactory explanation as regards the possession of the said articles. A number of decisions have been cited on behalf of the accused to suggest that in a situation like this the accused could be convicted only as receivers of stolen property. The Apex Court in the case of **Shri Bhagwan** v. **State of Rajasthan** reported in 2001 Criminal Law Journal 2925 has held that the possession of the fruits of the crime recently after it has been committed, affords a strong and reasonable ground for the presumption that the party in whose possession they are found was the real offender, unless he can account for such possession in some way consistent with his innocence. It is founded on the obvious principle that if such possession had been lawfully acquired, that party would be able to give an

account of the manner in which it was obtained. His unwillingness or inability to afford any reasonable explanation is regarded as amounting to strong, self inculpatory evidence. If the party gives a reasonable explanation as to how he obtained it, the Courts will be justified in not drawing the presumption of guilt. The force of this rule or presumption depends upon the recency of the possession as related to the crime and that if the interval of time be considerable, the presumption is weakened and more especially if the goods are of such kind as in the ordinary course such things frequently change hands. The Apex Court further observed that the Supreme Court had drawn similar presumption of murder and robbery in series of decisions especially when the accused was found in possession of these incriminating articles and was not in a position to give any reasonable explanation. This is precisely the case at hand. The dacoity took place on 20-9-2002 and 5 days later on 25-9-2002 the first 4 accused came to be chased, arrested and property seized from their possession at Bijnoor. The accused have failed to give any explanation as regards the said possession. Both the Courts below have placed reliance on the evidence of the Police Inspector PW15/Bahadur Singh Chawan to come to the

conclusion that the said accused were found in possession of the stolen articles soon after the theft and since this was a case of dacoity, it was safe to presume that the accused were the dacoits themselves; that the accused no.1 came to be given benefit of doubt on the face of the evidence of PW15/P.I.Chauhan by the learned Sessions Judge is another matter and which is irrelevant for the purpose of not upholding the convictions of the accused herein. The fact that Police Inspector PW15/Bahadur Singh Chawan not only chased the said maruti van in which the first 4 accused were travelling and then arrested the accused and seized the property found in their possession and later on got in touch with the local Member of Parliament in order to ascertain the phone number of the Police Station in whose jurisdiction this dacoity took pace and thereafter got in touch with Margao Police Station speaks very highly of his credibility and the fact that the driver of the maruti van was not examined so also the panchas as regards seizure, where there were none, in no way diminishes the credibility of the Police Inspector PW15/Bahadur Singh Chawan. I am of the view that the Trial Court was fully justified in relying on his evidence and convicting all the 4 accused based on the evidence that they were found in possession of the said

articles. A-2/Zulfikar Ali made a faint attempt belatedly to take a plea of alibi by producing an attendance slip for September, 2002 of Vivekanand Hospital and Research Centre(Moradabad) but did not examine anyone to prove the same. The learned trial Court rightly rejected the said plea as not established in the light of cogent evidence of PW15/P.I. Chauhan.

7. The next additional piece of evidence relied upon was that accused no.2/Zulfikar Ali and accused no.3/Sartaaj Alam were identified by PW1/Shri Noorani and accused no.3/Sartaaj Alam and accused no.4/Mehmood Shaikh were identified by PW2/Shirin Noorani. PW1/Noorani identified A-2/Zulfikar as the person who had asked the key of the cupboard and removed the jewellery. PW2/Shirin identified A-4/Mehmood Shaikh as one of the 4 persons who entered their bedroom. Earlier the aforesaid accused were identified by the said two witnesses at the Test Identification Parade held by PW8/B. Faria, the Special Judicial Magistrate.

8. On behalf of the accused a number of holes are sought to be punched to the proceedings of the said Test

Identification Parade. It is submitted that PW1/Shri Noorani had accompanied Dy. S. P. Shri Gaonkar to Seheora Police Station at Bijnoor and later to Margao Town Police Station where the accused were locked up and being so, it could be inferred that PW1/Shri Noorani had every opportunity to see the accused while they were in custody, prior to their identification. Questions in this regard were put to PW1/Shri Noorani and they were denied by him. PW18/P.I.Shivraikar has stated that Seheora Police Station had insisted for the presence of PW1/Shri Noorani, failing which they were reluctant to give the custody of the accused and the property. In my view, only because PW1/Shri Noorani had gone to Seheora Police Station in the company of the Dy.S.P. and later to Margao Town Police Station, there is no room for inference that the accused were shown to him a fact which otherwise he has denied and there is no reason why he should not be believed. It is nobody's case that PW1/Shri Noorani had accompanied the Police party which went and brought the accused from Seheora Police Station at Bijnoor to Margao Town Police Station and it does appear that PW1/Shri Noorani as well as Dy.S.P. Shri Gaonkar went independently and returned independently. It is next submitted that the learned

S.J.M. did not conduct the parade strictly as per the guidelines framed by this Court and as contained in the Criminal Manual. It is submitted that PW1/Shri Noorani could identify A-1/Zulfikar Ali not for the first round but for the second round, on being told by the learned S.J.M. It is further submitted that the parade ought to have been held in the judicial custody and not when the accused were in police custody. In the case at hand, the parade was held in the premises of the District Court where the Office of the S.J.M. is situated and Mr. P. P. Singh has not been able to point out to any decided case where proceedings is a Test Identification Parade are vitiated in case the said parade is held while the accused are in police custody inspite of the fact that the parade itself has been conducted by a Special Judicial Magistrate. It is further submitted after PW1/Shri Noorani identified A-2/Zulfikar Ali and before he could identify A-3/Sartaaj Alam he came to the very place where other witnesses were sitting and on this count also the proceedings of the identification parade are vitiated. It is really not necessary for me to deal with the submissions made on behalf of the accused herein. It must be observed that the guidelines given by this Court in the Criminal Manual are illustrative and not

exhaustive and only because a guideline here and a guideline there is not followed does not necessarily mean that the entire identification process should be thrown overboard. When every guideline is followed it gives a greater assurance as regards the identification but in the absence of not following a guideline here and a guideline there it does not necessarily mean that the entire process is vitiated. Those in charge of conducting parades should, therefore, ensure that all guidelines contained in the Criminal Manual are scrupulously followed as far as possible so that there is no room for suspicion. Both the Courts below have accepted the identification of the accused in this case by the said witnesses at the parade held by the Special Judicial Magistrate and one of the reasons why the identification has been accepted is that the accused were in full view of PW1/Shri Noorani and his wife PW2/Shirin for almost 45 minutes. The object of an identification parade is to make sure that the witness is able to recognize the suspect and this ability is fairly and adequately tested. It is said that identification parades are held not for the purpose of giving defence advocates to work on but in order to satisfy Investigation Officer of the bonafides of the prosecution witnesses. The identification parade proceedings being in the

nature of a test, no provision for holding any identification parade is found in the Code of Criminal Procedure or the Indian Evidence Act. Ordinarily an identification of the accused for the first time in the Court is not relied upon since the identification for the first time in the Court cannot possibly be termed to be non admissible but it is a matter of prudence that the same should be upon proper corroboration. The purpose of the proper identification parade is to strengthen the trustworthiness of the evidence. There may be exceptions from this general rule when the testimony of a witness can safely be relied upon without such corroboration. The identification at the test Identification Parades is not substantive evidence and what is substantive evidence is the evidence before the Court. In other words, the value of evidence obtained by Test Identification Parade is only corroborative evidence of identification in Court. The whole idea of an identification parade is that witnesses who claim to have seen the culprits at the time of occurrence, are to identify from the midst of other persons without any aid or any source and this identification test is usually adopted during the investigation of a crime by the Police and when the witnesses do not know their names and the identification test is a check upon

their veracity. The Apex Court in the case of **State of Maharashtra** v. **Suresh** (2000(1) Crimes 1) has stated that "if potholes were to be ferreted out from the proceedings of the Magistrate holding such parades possibly no Test Identification Parade could escape from one or two lapses. If a scrutiny is made from that angle alone and the result of the parade is treated as vitiated, every Test Identification Parade would become unusable. We remind ourselves that identification parades are not primarily meant for the Court. They are meant for investigation purposes. The identification is two fold. First, is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second, is to satisfy the investigation authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence. So the Officer conducting that Test Identification Parade should ensure that the said object of the parade is achieved. If he permits dilution of the modality to be followed in a parade, he should see to it that such relaxation would not impair the purpose of which the parade is held. As already stated, both the Courts below have accepted the evidence of the

identification of the accused herein based on a prior Test Identification Parade.

9. Lastly, on behalf of the accused, it is submitted, that the accused having been acquitted under Section 25 of the Arms Act, 1958, the accused could not have been convicted under Section 397 of the I.P.C. In fact, the learned trial Court in paragraph 65 of the judgment has acquitted the accused under Section 25 of the Arms Act because there was no consistency in the evidence that the said accused were armed with revolvers. The learned Sessions Judge has dealt with this aspect. After referring to Section 390 of the I.P.C. which defines robbery and Section 391 which defines dacoity has referred to Section 397 of the Indian Penal Code which provides that if at the time of committing the robbery or dacoity the offender uses deadly weapons or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person the imprisonment shall not be less than 7 years(emphasis supplied). On behalf of the accused much emphasis has been placed on the word "uses". It is in evidence that one of the accused had shown a gun to PW1/Shri Noorani and another a knife. PW2/Shirin had stated

that two of the persons had kept their pistols on their temple and were threatening them not to make noise, etc. It is submitted on behalf of the accused that the pistol to be used, it had to be fired and the knife to be used, some injury had to be inflicted with it, which admittedly did not happen in this case and since there was no use made of the said weapons the accused could not be convicted under Section 397 I.P.C. The learned Sessions Judge has noted, and in my view rightly, that Section 397 I.P.C. could be invoked only in case the offender uses any deadly weapon etc. and in this case there was sufficient material on record to show that the accused had used pistols and a knife while committing the offences and, therefore, the offence under Section 397 I.P.C. was attracted. The controversy raised is no longer res integra. The Apex Court in the case of **Phool Kumar** v. **Delhi Administration**(AIR 1975 SC 905) has referred to the expression "uses" in Section 397 I.P.C. and has referred to the cases reported in AIR 1934 LJ 522 and AIR 1956 Bom 353 and has held that whenever a weapon is brandished against a person in order to over-awe him or to frighten the victim it attracts the provision of Section 397 I.P.C. or when such weapon is used for the purpose of producing an impression upon the

mind of a person that he would be compelled to part with his property. In the light of the said decision also, the accused herein were rightly convicted under Section 397 I.P.C.

10. In my view, there is no merit in these revision applications and accordingly the same are hereby dismissed.

N. A. BRITTO, J.

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